House Tax Policy Committee – November 30, 2011
Testimony – HB 5146
Mr. Ed Clark, Chairman and CEO
American Seating Company
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## **AMERICAN SEATING - BACKGROUND**

Good Morning Members of the Committee. My name is Ed Clark and I am the Chairman and CEO of American Seating Company.

Before I give my testimony I want to say thank you to Mr. Mike Johnston of MMA for his introduction, and more importantly his and the MMA's support on this issue. Also joining me is our tax attorney, June Summers Haas from the law firm of Honigman Miller Schwartz and Cohn and Leslie Cummings our CFO.

American Seating was originally founded as Grand Rapids School Furniture in 1886. This 125 year old Michigan company set their history of innovation in motion with the combined student desk and chair unit. When introduced, it was the first of its kind, and the design revolutionized classroom seating. The success of that initial product launch helped American Seating expand over the years into other major markets, including Education, Entertainment, Sports, Transportation and Office.

## **ISSUE**

The reason we are here today is because the Michigan Department of Treasury is aggressively re-interpreting Michigan's Use Tax law through audits and creating a situation of double taxation for American Seating and other similar manufacturers in Michigan. To date we know of 4 other companies in the same situation with Treasury – 2 in litigation and 2 informal conference. If this practice is permitted to continue it will lead to a massive double taxation situation for hundreds other companies with similar business operational processes in the state of Michigan. This will obviously create a significant financial hardship on many Michigan companies and establish an unfriendly business environment in the state with current and potential manufacturers.

Auditors went into American Seating and reviewed all sales between 2006-2009. They completed their audit and have claimed that products manufactured in Michigan that are shipped out of state with the intended purpose of being affixed to real property as part of a construction project qualify for use tax once the product is taken out of inventory and placed in transit out of state to its destination. This application puts a double tax on American Seating as they are already assessed a use tax in the state their product is shipped to and affixed to the project. The transaction/transfer of ownership in these cases are not completed until the installation is finished, approved and the contract is closed out.

American Seating, much like other companies that manufacture a product that sometimes is being installed and permanently affixed to real property in another state, should only be assessed

the state use tax when the product they have manufactured is delivered to and installed on the real property in that state. The Department of Treasury has taken the position that companies, like American Seating are subject to use tax by Michigan when they place the manufactured product on a truck for export out of the state, even though the Department also asserts that the manufactured product is subject to use tax when installed and permanently affixed to real property. Thus, the Department argues that the single transaction is subject to use tax twice once by the state from which the product is being exported and again when the product is delivered and installed in the state of use. The Department says that the manufacturing business can simply request a refund/credit from the other state for the Michigan use tax paid. Easier said than done. The State of Virginia has already refused to provide such a credit. This is a very burdensome, costly and unrealistic business practice to impose on companies like American Seating. Not only will it create a significant cash flow problem when companies have to pay the same tax twice and hope the State of Michigan or some other state will process their refund/credit in a timely and non-bureaucratic manner, it also establishes a new policy in our State that only serves to further discourage investment, location and expansion in this state. As a Michigan based company the direction Treasury is taking with this policy only serves to benefit companies located in other states and will put American Seating and companies like ours at a tremendous competitive disadvantage.

I would respectfully request your consideration and support for legislative relief to amend Section 205.93a. of the Michigan Use Tax Act, PA 94 of 1937 and clarify the intent of the law. HB 5146 introduced by Representative Peter MacGregor would stop Treasury from assessing a double tax on many Michigan companies and also take away their power to retroactively seek new revenue in this situation by imposing a new policy and going after previous company revenues and profits to 2006.

Thank you for your time.

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# House Bill 5146 (2011) a rss

(Original Content Same As Senate Bill 0791)

### **Sponsors**

Peter MacGregor - (primary) Joe Haveman, Roy Schmidt, Lisa Lyons

Categories Use tax, collections; Use tax, definitions

Meetings Tax Policy 11/30/2011

Use tax; collections; tax for use or consumption for a manufacturer that affixes a product to real estate; clarify. Amends sec. 3a of 1937 PA 94 (MCL 205.93a).

## Bill Document Formatting Information

(gray icons indicate that the action did not occur or that the document is not available)

#### Documents



## **House Introduced Bill**

Introduced bills appear as they were introduced and reflect no subsequent amendments or changes.



## As Passed by the House

As Passed by the House Is the bill, as introduced, that includes any adopted House amendments.



#### As Passed by the Senate

As Passed by the Senate is the bill, as received from the House, that includes any adopted Senate amendments.



#### **House Enrolled Bill**

Enrolled bill is the version passed in identical form by both houses of the Legislature.

**History** (House actions In lowercase, Senate actions in UPPERCASE)

Date 🛦	Journal	Action
11/3/2011	.HJ 90 Pg. 256	Sintroduced by Representative Peter MacGregor
11/3/2011	HJ 90 Pg. 256	8 read a first time
11/3/2011	HJ 90 Pg. 256	8 referred to Committee on Tax Policy
11/8/2011	HJ 91 Pg. 257	8 printed bill filed 11/04/2011

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7

# **HOUSE BILL No. 5146**

November 3, 2011, Introduced by Reps. MacGregor, Haveman, Roy Schmidt and Lyons and referred to the Committee on Tax Policy.

A bill to amend 1937 PA 94, entitled "Use tax act,"

by amending section 3a (MCL 205.93a), as amended by 2008 PA 439.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

- 1 Sec. 3a. (1) The use or consumption of the following services
- 2 is taxed under this act in the same manner as tangible personal
- 3 property is taxed under this act:
- 4 (a) Except as provided in section 3b, intrastate
- 5 telecommunications services that both originate and terminate in
- 6 this state, including, but not limited to, intrastate private
  - communications services, ancillary services, conference bridging
  - service, 900 service, pay telephone service other than coin-
- 9 operated telephone service, and value-added nonvoice data service,
- 10 but excluding 800 service, coin-operated telephone service, fixed

- 1 wireless service, 1-way paging service, prepaid calling service,
- 2 telecommunications nonrecurring charges, and directory advertising
- 3 proceeds.
- 4 (b) Rooms or lodging furnished by hotelkeepers, motel
- 5 operators, and other persons furnishing accommodations that are
- 6 available to the public on the basis of a commercial and business
- 7 enterprise, irrespective of whether or not membership is required
- 8 for use of the accommodations, except rooms and lodging rented for
- 9 a continuous period of more than 1 month. As used in this act,
- 10 "hotel" or "motel" means a building or group of buildings in which
- 11 the public may obtain accommodations for a consideration,
- 12 including, without limitation, such establishments as inns, motels,
- 13 tourist homes, tourist houses or courts, lodging houses, rooming
- 14 houses, nudist camps, apartment hotels, resort lodges and cabins,
- 15 camps operated by other than nonprofit organizations but not
- 16 including those licensed under 1973 PA 116, MCL 722.111 to 722.128,
- 17 and any other building or group of buildings in which
- 18 accommodations are available to the public, except accommodations
- 19 rented for a continuous period of more than 1 month and
- 20 accommodations furnished by hospitals or nursing homes.
- (c) Except as provided in section 3b, interstate
- 22 telecommunications services that either originate or terminate in
- 23 this state and for which the charge for the service is billed to a
- 24 service address in this state or phone number by the provider
- 25 either within or outside this state including, but not limited to,
- 26 ancillary services, conference bridging service, 900 service, pay
- 27 telephone service other than coin-operated telephone service, and

- 1 value-added nonvoice data services, but excluding interstate
- 2 private communications service, 800 service, coin-operated
- 3 telephone service, fixed wireless service, 1-way paging service,
- 4 prepaid calling service, telecommunications nonrecurring charges,
- 5 and international telecommunications service.
- 6 (d) The laundering or cleaning of textiles under a sale,
- 7 rental, or service agreement with a term of at least 5 days. This
- 8 subdivision does not apply to the laundering or cleaning of
- 9 textiles used by a restaurant or retail sales business. As used in
- 10 this subdivision, "restaurant" means a food service establishment
- 11 defined and licensed under the food law of 2000, 2000 PA 92, MCL
- 12 289.1101 to 289.8111.
- (e) The transmission and distribution of electricity, whether
- 14 the electricity is purchased from the delivering utility or from
- 15 another provider, if the sale is made to the consumer or user of
- 16 the electricity for consumption or use rather than for resale.
- 17 (f) For a manufacturer who affixes its product to real estate
- 18 IN THIS STATE and maintains an inventory of its product that is
- 19 available for sale to others or who makes its product available for
- 20 sale to others by publication or price list, the PRICE IS THE
- 21 direct production costs and indirect production costs of the
- 22 product affixed to the real estate IN THIS STATE that are incident
- 23 to and necessary for production or manufacturing operations or
- 24 processes, as defined by the department.
- 25 (g) For a manufacturer who affixes its product to real estate
- 26 IN THIS STATE but does not maintain an inventory of its product
- 27 available for sale to others or make its product available for sale

- 1 to others by publication or price list, THE PRICE IS the sum of the
- 2 materials cost of the property and the cost of labor to
- 3 manufacture, fabricate, or assemble the property AFFIXED TO THE
- 4 REAL ESTATE IN THIS STATE, but not the cost of labor to cut, bend,
- 5 assemble, or attach the property at the site for affixation to real
- 6 estate IN THIS STATE.
- 7 (2) If charges for intrastate telecommunications services or
- 8 telecommunications services between this state and another state
- 9 and other billed services not subject to the tax under this act are
- 10 aggregated with and not separately stated from charges for
- 11 telecommunications services that are subject to the tax under this
- 12 act, the nontaxable telecommunications services and other
- 13 nontaxable billed services are subject to the tax under this act
- 14 unless the service provider can reasonably identify charges for
- 15 telecommunications services not subject to the tax under this act
- 16 from its books and records that are kept in the regular course of
- 17 business.
- 18 (3) If charges for intrastate telecommunications services or
- 19 telecommunications services between this state and another state
- 20 and other billed services not subject to the tax under this act are
- 21 aggregated with and not separately stated from telecommunications
- 22 services that are subject to the tax under this act, a customer may
- 23 not rely upon the nontaxability of those telecommunications
- 24 services and other billed services unless the customer's service
- 25 provider separately states the charges for nontaxable
- 26 telecommunications services and other nontaxable billed services
- 27 from taxable telecommunications services or the service provider

- 1 elects, after receiving a written request from the customer in the
- 2 form required by the provider, to provide verifiable data based
- 3 upon the service provider's books and records that are kept in the
- 4 regular course of business that reasonably identify the nontaxable
- 5 services.
  - 6 (4) All of the following apply in the case of a bundled
  - 7 transaction that includes telecommunications service, ancillary
  - 8 service, internet access, or audio or video programming:
  - 9 (a) If the purchase price is attributable to products that are
- 10 taxable and products that are nontaxable, the portion of the
- 11 purchase price attributable to the nontaxable products may be
- 12 subject to tax unless the provider can identify by reasonable and
- 13 verifiable standards that portion from its books and records that
- 14 are kept in the regular course of business for other purposes,
- 15 including, but not limited to, nontax purposes.
- 16 (b) The provisions of this subsection apply unless otherwise
- 17 provided by federal law.
- 18 (5) As used in this section:
- 19 (a) "Ancillary services" means services that are associated
- 20 with or incidental to the provision of telecommunications services,
- 21 including, but not limited to, detailed telecommunications billing,
- 22 directory assistance, vertical service, and voice mail services.
- 23 (b) "Bundled transaction" means the purchase of 2 or more
- 24 distinct and identifiable products, except real property and
- 25 services to real property, where the products are sold for a single
- 26 nonitemized price. A bundled transaction does not include the sale
- 27 of any products in which the sales price varies, or is negotiable,

- 1 based on the selection by the purchaser of the products included in
- 2 the transaction. As used in this subdivision:
- 3 "(i)" "Distinct and identifiable products" does not include any
- 4 of the following:
- 5 (A) Packaging, such as containers, boxes, sacks, bags, and
- 6 bottles or other materials such as wrapping, labels, tags, and
- 7 instruction guides, that accompany the purchase of the products and
- 8 are incidental or immaterial to the purchase of the products,
- 9 including grocery sacks, shoeboxes, dry cleaning garment bags, and
- 10 express delivery envelopes and boxes.
- 11 (B) A product provided free of charge with the required
- 12 purchase of another product. A product is provided free of charge
- 13 if the sales price of the product purchased does not vary depending
- 14 on the inclusion of the product provided free of charge.
- 15 (C) Items included in purchase price.
- 16 (ii) "Purchase price" means the price paid by the seller for
- 17 the property.
- 18 (iii) "Sales price" means that term as defined in section 1 of
- 19 the general sales tax act, 1933 PA 167, MCL 205.51.
- 20 (iv) "Single nonitemized price" does not include a price that
- 21 is separately identified by product on binding sales or other
- 22 supporting sales-related documentation made available to the
- 23 purchaser in paper or electronic form, including, but not limited
- 24 to, an invoice, bill of sale, receipt, contract, service agreement,
- 25 lease agreement, periodic notice of rates and services, rate card,
- 26 or price list.
- 27 (ν) Bundled transaction does not include any of the following:

- 1 (A) The purchase of tangible personal property and a service
- 2 if the tangible personal property is essential to the use of the
- 3 service and is provided exclusively in connection with the service
- 4 and the true object of the transaction is the service.
- 5 (B) The purchase of services if 1 service is provided that is
- 6 essential to the use or receipt of a second service and the first
- 7 service is provided exclusively in connection with the second
- 8 service and the true object of the transaction is the second
- 9 service.
- 10 (C) A transaction that includes taxable and nontaxable
- 11 products and the purchase price of the taxable products is de
- 12 minimis. As used in this sub-subparagraph, "de minimis" means the
- 13 seller's purchase price or sales price of the taxable products is
- 14 10% or less of the total purchase price or sales price of the
- 15 products. A seller shall use the full term of a service contract to
- 16 determine if the taxable products are de minimis. A seller shall
- 17 use either the purchase price or the sales price of the products to
- 18 determine if the taxable products are de minimis. A seller shall
- 19 not use a combination of the purchase price and sales price of the
- 20 products to determine if the taxable products are de minimis.
- 21 (D) The retail sale of exempt tangible personal property and
- 22 taxable tangible personal property if all of the following
- 23 conditions are satisfied:
- 24 (I) The transaction includes food and food ingredients,
- 25 prescription or over-the-counter drugs, durable medical equipment,
- 26 mobility enhancing equipment, medical supplies, or prosthetic
- 27 devices.

- 1 (II) Where the seller's purchase price or sales price of the
- 2 taxable tangible personal property is 50% or less of the total
- 3 purchase price or sales price of the bundled tangible personal
- 4 property. A seller may not use a combination of the purchase price
- 5 and sales price of the tangible personal property when making the
- 6 50% determination for a transaction.
- 7 (c) "Coin-operated telephone service" means a
- 8 telecommunications service paid for by inserting money into a
- 9 telephone that accepts direct deposits of money to operate.
- 10 (d) "Conference bridging service" means an ancillary service
- 11 that links 2 or more participants of an audio or video conference
- 12 call and may include the provision of a telephone number, but does
- 13 not include the telecommunications services used to reach the
- 14 conference bridge.
- 15 (e) "Detailed telecommunications billing service" means an
- 16 ancillary service of separately stating information pertaining to
- 17 individual calls on a customer's billing statement.
- 18 (f) "Directory assistance" means an ancillary service of
- 19 providing telephone number information or address information.
- 20 (g) "Fabricate" means to modify or prepare tangible personal
- 21 property for affixation or assembly.
- 22 (h) "Fixed wireless service" means a telecommunications
- 23 service that provides radio communication between fixed points.
- (i) "International" means a telecommunications service that
- 25 originates or terminates in the United States and terminates or
- 26 originates outside the United States, respectively. United States
- 27 includes the District of Columbia and any possession or territory

- 1 of the United States:
- 2 (j) "Interstate" means a telecommunications service that
- 3 originates in 1 United States state, territory, or possession and
- 4 terminates in a different United States state, territory, or
- 5 possession.
- 6 (k) "Intrastate" means a telecommunications service that
- 7 Originates in a United States state, territory, or possession and
- 8 terminates in the same United States state, territory, or
- 9 possession.
- 10 (1) "Manufacture" means to convert or condition tangible
- 11 personal property by changing the form, composition, quality,
- 12 combination, or character of the property.
- (m) "Manufacturer" means a person who manufactures,
- 14 fabricates, or assembles tangible personal property.
- 15 (n) "Paging service" means a telecommunications service that
- 16 provides transmission of coded radio signals for the purpose of
- 17 activating specific pagers, which may include messages or sounds.
- 18 (o) "Pay telephone service" means a telecommunications service
- 19 provided through any pay telephone.
- (p) "Prepaid calling service" means the right to access
- 21 exclusively telecommunications services that must be paid for in
- 22 advance and that enables the origination of calls using an access
- 23 number or authorization code, whether manually or electronically
- 24 dialed, and that is sold in predetermined units or dollars that
- 25 decline with use in a known amount.
- 26 (q) "Private communications service" means a
- 27 telecommunications service that entitles the customer to exclusive

- 1 or priority use of a communications channel or group of channels
- 2 between or among termination points, regardless of the manner in
- 3 which that channel or group of channels are connected, and includes
- 4 switching capacity, extension lines, stations, and any other
- 5 associated services that are provided in connection with the use of
- 6 that channel or group of channels.
- 7 (r) "Telecommunications nonrecurring charges" means an amount
- 8 billed for the installation, connection, change, or initiation of
- 9 telecommunications service received by the customer.
- 10 (s) "Telecommunications service" means the electronic
- 11 transmission, conveyance, or routing of voice, data, audio, video,
- 12 or any other information or signals to a point, or between or among
- 13 points, including a transmission, conveyance, or routing in which
- 14 computer processing applications are used to act on the form, code,
- 15 or protocol of the content for purposes of transmission,
- 16 conveyance, or routing without regard to whether that service is
- 17 referred to as voice over internet protocol services or is
- 18 classified by the federal communications commission as enhanced or
- 19 value added. Telecommunications service does not include any of the
- 20 following:
- 21 (i) Data processing and information services that allow data to
- 22 be generated, acquired, stored, processed, or retrieved and
- 23 delivered by an electronic transmission to a purchaser where the
- 24 purchaser's primary purpose for the underlying transaction is the
- 25 processed data or information.
- 26 (ii) Installation or maintenance of wiring or equipment on a
- 27 customer's premises.

- 1 (iii) Tangible personal property.
- 2 (iv) Advertising, including, but not limited to, directory
- 3 advertising.
- 4 ( $\nu$ ) Billing and collection services provided to third parties.
- 5 (vi) Internet access service.
- 6 (vii) Radio and television audio and video programming
- 7 services, including, but not limited to, cable service as defined
- 8 in 47 USC 522(6) and audio and video programming services delivered
- 9 by commercial mobile radio service providers as defined in 47 CFR
- 10 20.3, regardless of the medium, including the furnishing of
- 11 transmission, conveyance, and routing of those services by the
- 12 programming service provider.
- 13 (viii) Ancillary services.
- 14 (ix) Answering services, if the primary purpose of the
- 15 transaction is the answering service rather than message
- 16 transmission.
- 17 (x) Digital products delivered electronically, including, but
- 18 not limited to, software, music, video, reading materials, or ring
- 19 tones.
- 20 (t) "Value-added nonvoice data service" means a
- 21 telecommunications service in which computer processing
- 22 applications are used to act on the form, content, code, or
- 23 protocol of the information or data primarily for a purpose other
- 24 than transmission, conveyance, or routing.
- 25 (u) "Vertical service" means an ancillary service that is
- 26 offered in connection with 1 or more telecommunications services
- 27 that offers advanced calling features that allow customers to

- 1 identify callers and to manage multiple calls and call connections,
- 2 including conference bridging services.
- 3 (v) "Voice mail service" means an ancillary service that
- 4 enables the customer to store, send, or receive recorded messages,
- 5 but does not include any vertical services that the customer may be
- 6 required to have in order to utilize the voice mail service.
- 7 (w) "800 service" means a telecommunications service that
- 8 allows a caller to dial a toll-free number without incurring a
- 9 charge for the call, typically marketed under the designation
- 10 "800", "855", "866", "877", or "888" toll-free calling, or any
- 11 subsequent number designated by the federal communications
- 12 commission.
- 13 (x) "900 service" means an inbound toll telecommunications
- 14 service purchased by a subscriber that allows the subscriber's
- 15 customers to call in to the subscriber's prerecorded announcement
- 16 or live service, typically marketed under the designation "900"
- 17 service, and any subsequent number designated by the federal
- 18 communications commission, but does not include a charge for
- 19 collection services provided by the seller of the
- 20 telecommunications services to the subscriber, or the service or
- 21 product sold by the subscriber to the subscriber's customer.
- Enacting section 1. This amendatory act is retroactive and is
- 23 effective January 1, 2006.

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